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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules
To Preempt State and Local Regulation
of Tower Siting for Commercial Mobile
Services Providers

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RM-8577

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REPLY COMMENTS OF CENTURY CELLUNET, INC.

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REPLY COMMENTS OF CENTURY CELLUNET, INC.

Century Cellunet, Inc., on behalf of itself and its cellular affiliates ("Century"),¹ hereby submits its reply with respect to the comments filed in response to the above-referenced Petition for Rule Making filed by the Cellular Telecommunications Industry Association ("CTIA").² CTIA's *Petition* urges the Commission to institute a rulemaking containing proposals "to preempt state and local governments from enforcing zoning and other similar regulations which have the purpose or effect of barring or impeding commercial mobile radio service ('CMRS') providers from locating and constructing new towers."³ The *Petition* demonstrates that

¹ Century, which is affiliated with landline telephone companies, has cellular operations in both MSAs and RSAs, on both Block A and Block B frequencies, located throughout the country.

² In the Matter of Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Services Providers, Cellular Telecommunications Industry Association's Petition for Rule Making, RM-8577 (filed Dec. 22, 1994) ("*Petition*"). Pursuant to FCC Public Notice, Rpt. No. 2052 (Jan. 18, 1995), comments were due February 17, 1995, and reply comments are due March 6, 1995.

³ *Petition* at 1-2 (footnote omitted).

such action is authorized by Sections 2(b) and 332 of the Communications Act, as amended.⁴ The *Petition* elicited formal and informal comments from a wide range of entities and individuals voicing diverse views on the appropriate action to be taken by the Commission.

I. SUMMARY

Century supports Commission initiation of a rulemaking proceeding as requested by CTIA. The record demonstrates the serious problems being faced by cellular and other CMRS operators in seeking to provide comprehensive, competitive wireless services around the country. Moreover, as the opening comments underscore, tower siting difficulties will undoubtedly increase as existing systems seek to fill in their coverage areas to meet consumer demand and as new CMRS operations attempt to establish their necessary infrastructure.

The record details the Commission's authority to take action in this critical matter. Century supports the proposal made by GTE Mobile Communications, Inc. and GTE Mobilnet, Inc. ("GTE"), which attempts to strike an appropriate balance between the needs of CMRS operators (and their customers) and the concerns of states and localities with regard to the location of towers and antennas within their jurisdictions. At a minimum, the Commission should propose rules as suggested by United States Cellular Corporation ("USCC") to prohibit states and localities from:

⁴ 47 U.S.C. §§ 152(b), 332.

banning CMRS towers altogether; discriminating between different types of FCC licensees in tower siting determinations; passing radiofrequency radiation standards; or extracting excessive "in kind" or monetary concessions from CMRS providers.

II. THE RECORD DEMONSTRATES THE SERIOUS PROBLEMS ALREADY FACED BY CMRS OPERATORS AND THE NEED FOR COMMISSION INTERVENTION

CTIA points out in its *Petition* that:

Further development of the nation's [CMRS] infrastructure will be significantly hampered if localities are able to inject additional costs and delays into the build out process. Unnecessary and disparate regulation will diminish consumer welfare by adding costs to all participants in the mobile services marketplace.⁵

The opening comments contain numerous examples of the problems faced by existing cellular and paging operators in seeking to initiate or improve existing service to various regions in the country.⁶ Century's own experience confirms the magnitude of these increasingly serious problems.

⁵ *Petition* at 10.

⁶ *E.g.*, American Personal Communications Comments at 2-5; Cellular Communications of Puerto Rico, Inc. ("CCPR") Comments at 2-4; Frontier Cellular Holding, Inc. ("FCHI") Comments at 6-9; McCaw Cellular Communications, Inc. ("McCaw") Comments at 11-19; NYNEX Mobile Communications Company ("NYNEX") Comments at 4-7; Pacific Telecom Cellular, Inc. Comments at Appendix; Southwestern Bell Mobile Systems, Inc. ("SBMS") Comments at 10-15; Sprint Corporation ("Sprint") Comments at 3-9; USCC Comments at 4-9; Vanguard Cellular Systems, Inc. ("Vanguard") Comments at 2-5.

An average site takes Century approximately eight months to put into operation. It takes approximately two and one-half months to locate property to serve the desired area. It then takes an average of five months to obtain the necessary zoning approvals, and only five weeks to construct the tower and cell site. Thus, on average, approximately 60 percent of the time necessary to put a cell into operation is spent on obtaining zoning approval, while only 15 percent of the time is spent on actual construction.

In building out its cellular systems, Century consistently has researched applicable zoning requirements, and has sought to locate sites that avoid most zoning problems or raising local concerns about a tower and antenna location. Century is increasingly finding, however, that it can no longer steer away from those areas that present zoning problems under applicable local regulations if Century wants to be able to provide quality cellular service to the public. Zoning regulations -- many of them apparently unnecessarily restrictive⁷ -- are becoming more and more of a problem hindering cellular service deployment.

⁷ Century recognizes that, in many cases, valid concerns underlie the zoning regulations adopted by states and localities. At the same time, however, it appears to Century that applicable procedures and requirements in some localities lack any sound basis. Moreover, some zoning regulations appear to fail to take into account the legitimate interests of businesses, individuals, and public safety organizations located within the jurisdictional boundaries in being able to obtain quality, reliable cellular service.

To further support the record in this proceeding, Century provides examples of some of the problems it has encountered in attempting to build and operate cellular sites:

- Arizona 3 RSA -- Navajo County, Hopi Indian Reservation: An unelected village clan reviewed Century's request for a tower site for almost one year, and then rejected the application. The Village Development Committee, the Tribe, and the Bureau of Indian Affairs ("BIA") declined to override the decision. The timing of that action as well as Century's protected build-out period in this RSA has resulted in Century being unable to provide cellular service in this area.⁸
- Arizona 3 RSA -- Navajo County: Century's proposed cell site was delayed by the U.S. Forest Service for approximately eight months.⁹
- Arizona 3 RSA -- Apache County, Navajo Indian Reservation: Action delayed on cell site for over 12 months due to Tribal and BIA approval process. Century continues to operate with stand alone generators due to Tribal Utility Authority right of way dispute.
- Monroe, Louisiana MSA -- Ouachita Parish: Local government requires a height variance application be filed with the West Monroe Planning Commission and the Board of Adjustments for any planned structure over 35 feet. Century proposed to construct a 150 foot monopole tower. The Board of Adjustments declined Century's height variance, citing radiation, interference with one satellite dish, and assumed negative

⁸ Century's review of the opening comments in this proceeding indicates that no party addressed the issues raised by the jurisdiction of Indian tribes within various cellular markets. While these situations raise somewhat different legal issues, because of the legal status of Indian tribes, Century urges the Commission to address this matter in any notice of proposed rulemaking regarding preemption of zoning regulations affecting CMRS tower sites and antennas.

⁹ It does not appear that this proceeding can address the problems cellular operators face in obtaining timely action by the U.S. Forest Service ("USFS") or the BIA on site requests. Nonetheless, the Commission perhaps could recommend that the USFS and the BIA take steps to expedite their respective approval processes as part of the "reinventing government" initiative.

effect on surrounding property values. Century presented evidence showing that none of these were valid complaints.

- Grand Rapids, Michigan MSA -- Kent County: Over the past three years, Century has been forced to apply for zoning approvals for five difference sites in three different townships (Sparta, Cassanovia, and Tyrone), and was denied each time. Century finally received approval for a site from the Tyrone Township and the FAA, only to be disapproved by the Michigan Aeronautical Association.¹⁰ Century accordingly is still not able to provide service in Kent County.
- New Mexico 1 RSA -- McKinley County, Navajo Reservation: Century was delayed approximately three years in putting a cell site into operation. The delay initially was due to the refusal of a grazing lessee to grant consent unless paid. This lessee was also a Tribal Council delegate who convinced the Chapter to abstain from endorsing the project. Further delay resulted from the BIA office refusing to comply with Code of Federal Regulations requirements.
- New Mexico 1 RSA -- Laguna Indian Tribe: Century negotiated with the Tribal Council for over one year. The Council refused to place the item on the agenda. Century finally was able to lease space on a competitor's tower located on tribal land.
- New Mexico 1 RSA -- Navajo Indian Reservation: Century was delayed for 18 months due to confusion by BIA and the Tribe as to applicable regulations.
- New Mexico 1 RSA -- Taos County: The Taos County Commission passed a moratorium on construction of communications towers or any other structure of more than 70 feet in height in order to block

¹⁰ The Michigan Aeronautical Association, which reviews tower proposals in the state, applies more stringent standards than the Federal Aviation Administration ("FAA"), the federal agency charged with protecting air safety in this country. Paging Network, Inc. ("PageNet") accurately points out that "this aspect of antenna site regulation is vested solely at the federal level." Paging Network, Inc. Comments at 3. Century urges the Commission to preempt any state or local regulations that impose restrictions relating to aircraft navigation above and beyond those imposed by the Commission and the FAA.

construction of towers. This action delayed Century in providing service in Taos for over two years.

Century's experiences support the information already in the record in this proceeding -- that tower siting is becoming an increasingly difficult process, as CMRS operators face delays, discriminatory regulations and treatment, and inflexibility on the part of state and local jurisdictions, Indian tribes, the BIA, and the USFS.

Unreasonable restrictions and application requirements in turn hinder the opportunities for cellular and other CMRS carriers to provide publicly sought wireless services.¹¹

Moreover, the problems and conflicts are only going to increase. The opening comments highlight two readily apparent facts. First, as cellular and paging carriers seek to fill in their existing operations and provide quality service to meet ever-increasing consumer demand, the areas in which transmitters must be located in order to meet those needs become smaller and less flexible.¹² Second, the Commission's authorization of new service providers -- for example, personal communications

¹¹ The Connecticut Attorney General and the Connecticut Siting Council described the framework in place in Connecticut for addressing telecommunications siting matters. Connecticut Attorney General and Connecticut Siting Council ("CSC") Comments at 6-8. Indeed, the CSC has found that "proper state regulation fosters healthy competition and assists the industry in developing efficient tower networks." *Id.* at 9. The Connecticut plan, as described in the comments, appears to represent a balanced, reasonable approach. Unfortunately, this type of approach is not being pursued in many states and localities.

¹² *E.g.*, GTE Comments at 4; McCaw Comments at 4; USCC Comments at 3.

services ("PCS") licensees -- will substantially increase the demand for tower and transmitter space.¹³

Congress and the Commission have taken a number of actions in the past few years to promote a dynamic, competitive wireless marketplace. States and local jurisdictions, driven both by legitimate concerns and ill-founded perceptions and beliefs, have at the same time imposed a patchwork of zoning requirements. Unfortunately, many of these regulations impose unnecessary and/or discriminatory restrictions on the ability of CMRS operators to construct facilities appropriate for system operations, yet consistent with rational community zoning considerations. As many of the opening round commenters point out, this situation will undercut the important Congressional and Commission activities undertaken to date with respect to the wireless marketplace. Accordingly, Commission action at this time to initiate a rulemaking addressing this matter is fully warranted.

III. THE COMMISSION HAS THE STATUTORY AUTHORITY NECESSARY TO TAKE APPROPRIATE PREEMPTION ACTION

CTIA's *Petition* details the statutory basis for the Commission to preempt state and local tower siting regulations that have the effect of thwarting the joint Congressional-Commission policy of fostering the provision of interstate wireless telecommunications services. The *Petition* details the Congressional goals and purposes

¹³ *E.g.*, Cox Enterprises, Inc. Comments at 2-3; GTE Comments at 4; McCaw Comments at 4; Sprint Comments at 10; USCC Comments at 3.

underlying adoption of Section 332 of the Communications Act in 1993, appropriately concluding that "Congress intended that the mobile services marketplace function efficiently, competitively, and with a minimum of regulatory intervention."¹⁴

Moreover, "[t]o give full scope to the congressional mandate, it is necessary to construe narrowly Congress' reservation of zoning authority to the states."¹⁵ CTIA has demonstrated that, under Section 332, "the Commission is permitted to preempt such zoning regulation of CMRS tower sites to further legitimate federal policy objectives. In this case, states cannot be permitted to thwart directly or indirectly through zoning and other similar regulation the full competitive build out of mobile services."¹⁶

The *Petition* also explains why the preemption sought by CTIA is appropriate under Section 2(b) of the Communications Act, as amended. Specifically, "under [Section] 2(b), zoning and other similar regulations which have the purpose or effect of barring the provision of interstate service are preemptible."¹⁷ Relying upon the "impossibility exception," the *Petition* points out that "state regulations which physically delay or prevent the siting and build out of CMRS towers, by excessive costs or otherwise, directly impinge upon interstate communications as well as

¹⁴ *Petition* at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ *Id.* at 11.

Congress' decision favoring a competitive, efficient wireless infrastructure subject to uniform, federal regulation."¹⁸

CTIA's analysis is confirmed in a number of the opening comments.¹⁹ The initial comments also identify other bases supporting preemption action by the Commission.²⁰ These submissions make clear that the Commission has full authority to take appropriate preemption action with respect to CMRS tower siting matters. A rulemaking proceeding will permit the Commission to explore the full scope of its statutory and regulatory authority, and lead to a comprehensive explanation of any eventual action taken to preempt state and local tower siting regulations that thwart the joint Congressional and Commission policy of fostering the provision of interstate wireless telecommunications services.

IV. CENTURY SUPPORTS GTE'S PROPOSAL FOR THE DEVELOPMENT OF CONSENSUS NATIONAL STANDARDS THAT WOULD PERMIT RATIONAL INFRASTRUCTURE BUILD-OUT WHILE ACCOMMODATING REASONABLE LOCAL ZONING CONCERNS

GTE has proposed, in its opening comments on the CTIA *Petition*, that the Commission propose to "convene representatives of the Commission, the wireless

¹⁸ *Id.* at 13.

¹⁹ *E.g.*, CCPR Comments at 1; FCHI Comments at 3-6; McCaw Comments at 6; Mobile Telecommunication Technologies Corp. Comments at 2-4; NYNEX Comments at 2-3; Palmer Communications Incorporated Comments at 2-5; Personal Communications Industry Association Comments at 7-10; SBMS Comments at 5-7; USCC Comments at 2; Vanguard Comments at 1-2.

²⁰ *E.g.*, NYNEX Comments at 2-3.

industry, urban planners, the National League of Cities, and state and local officials, for example, to develop consensus national standards to guide the location of CMRS towers and associated zoning decisions."²¹ GTE envisions that "[t]he standards ultimately developed should be flexible enough to accommodate local differences, but firm enough to ensure wireless carriers reasonable access to tower sites under reasonable terms and conditions."²² GTE concludes that this process can permit "both sides [to] emerge victorious:"

The wireless industry will benefit from the ability to build out its infrastructure in a predictable time period and at a predictable cost. Localities will benefit from the comments of nationally renowned architects and urban planners, whose input should result in creative solutions to the issues surrounding tower siting. In addition, the citizens of each community will benefit from the provision of more reliable, higher quality wireless service consistent with resolution of their zoning concerns.²³

Century urges the Commission to pursue implementation of the approach suggested by GTE, which reflects a good, equitable balance of the competing considerations involved in tower siting matters. Century recognizes that development of consensus national standards guiding the siting of CMRS towers and antennas will not be accomplished after a single meeting. At the same time, the process permits a full airing of considerations and the achievement of substantial agreement on a matter that clearly is of utmost importance to CMRS operators as well as local residents and

²¹ GTE Comments at ii.

²² *Id.* at 9.

²³ *Id.* at 10-11.

their state and local governments. Basic national standards will permit service providers like Century, with operations scattered around the country, to undertake their system planning in a more rational manner and with reasonable expectations about local processing and action on tower site proposals. From Century's perspective, and as pointed out by GTE, it seems that all parties affected by tower siting matters -- service providers, local residents and their representatives, and the users of wireless services -- will benefit by this process.

In the event that the Commission concludes that it has only limited preemption authority or that pursuit of the GTE proposal is not feasible, Century urges the Commission at least to propose the actions set forth in the comments of USCC. USCC, after detailing the types of problems it has faced in establishing cellular towers, urges the Commission to apply the following guidelines:

Local communities should not be free to ban CMRS towers altogether, or to discriminate between different types of FCC licensees in tower siting determinations. Localities should not be granted authority to have their own RF radiation standards or to obtain excessive "in kind" or monetary concessions from CMRS licensees seeking to provide service.²⁴

These steps are the minimum necessary to permit the cellular, paging, and overall CMRS marketplace to continue its successful development and for individual service providers to be able to meet public demands for service.²⁵

²⁴ USCC Comments at 9.

²⁵ Century agrees with the comments of a number of parties that the Commission
(continued...)

V. CONCLUSION

The CMRS industry has reached a critical point in its development. State and local zoning regulations imposed for illegitimate or unsound reasons could, without appropriate Commission intervention, seriously impede the ability of CMRS providers to meet the service demands of the public. Century concurs with the many commenters in this proceeding that the Commission should initiate a proceeding proposing necessary preemption of state and local zoning regulations. The Commission clearly has ample statutory authority to undertake such action. The Commission should pursue the

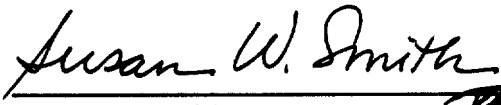

²⁵(...continued)

also should preempt radiofrequency-based regulation by states and localities. While this issue is inherently connected with CMRS tower siting issues, Century understands that it will be separately addressed in ET Docket No. 93-62, in connection with the Petition for Further Notice of Proposed Rulemaking filed by the Electromagnetic Energy Association ("EEA"). See In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Electromagnetic Energy Association Petition for Further Notice of Proposed Rulemaking, ET Docket No. 93-62 (filed Dec. 22, 1994). EEA specifically urges the Commission "to adopt a rule that would preempt state and local regulation of electromagnetic matters to the extent such regulation is inconsistent with the standards adopted by the Commission to govern the construction and operation of FCC-licensed transmission antennas." *Id.* at 1 (footnote omitted).

proposal set forth by GTE, and seek to establish national consensus standards that benefit CMRS providers, states and localities, and wireless service subscribers.

Respectfully submitted,

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March 6, 1995

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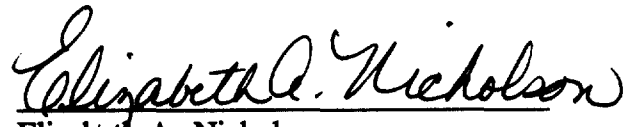
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